

DOCKET FILE COPY ORIGINAL  
BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, DC 20554

RECEIVED

NOV 20 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

Revision of Rules and Policies for the  
Direct Broadcast Satellite Service

)  
) IB Docket No. 95-168  
) PP Docket No. 93-253  
)  
)

To: The Commission

**COMMENTS OF BELL SOUTH CORPORATION**

**BELL SOUTH CORPORATION**

John F. Beasley  
William B. Barfield  
Jim O. Llewellyn  
1155 Peachtree Street, N.E., Suite 1800  
Atlanta, Georgia 30309-2641  
(404)249-4445

Charles P. Featherstun  
David G. Richards  
1133 21st Street, N.W.  
Washington, D.C. 20036  
(202) 463-4132

Its Attorneys

November 20, 1995

No. of Copies rec'd  
List ABCDE

0+4

## **TABLE OF CONTENTS**

|   | <b><u>Page</u></b> |
|---|--------------------|
| A. Summary .....  | 1                  |
| B. Buildout, Affiliation and Ownership Restrictions .....                 | 2                  |
| C. Additional Service and Distribution Restrictions are Unwarranted ..... | 5                  |
| D. The FCC's Current Program Access Rules are Inadequate .....            | 8                  |
| E. Service to Alaska and Hawaii .....                                     | 9                  |
| F. Conclusion .....   | 10                 |

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, DC 20554

|  |   |                      |
|--|---|----------------------|
| In the Matter of                       | ) |                      |
|  | ) | IB Docket No. 95-168 |
| Revision of Rules and Policies for the | ) | PP Docket No. 93-253 |
| Direct Broadcast Satellite Service     | ) |                      |
|  | ) |                      |

To: The Commission

**COMMENTS OF BELL SOUTH CORPORATION**

**A. Summary**

BellSouth Corporation fully supports the FCC's attempt to establish a modified regulatory framework for the Direct Broadcast Satellite ("DBS") Service.<sup>1</sup> Clearly, the long-standing absence of any competitive DBS service providers requires new rules that encourage timely construction of new DBS facilities while promoting competition with existing multichannel video programming distributors ("MVPDs"). Properly implemented, such rules will allow various segments of the communications industry to enter the DBS market and thereby provide consumers with additional choices for delivery of video, voice and data services to the home.

Accordingly, as discussed in greater detail below, BellSouth supports the FCC's proposed "anti-warehousing" rules and its proposed 32-channel spectrum cap for DBS service providers. BellSouth believes, however, that given the presence of these restrictions it is unnecessary for the FCC to also limit any MVPD-affiliated DBS service provider to only one full CONUS orbital slot. Further, BellSouth submits that the FCC

---

<sup>1</sup> BellSouth's interest in this proceeding is as a potential DBS service provider or competitor.

will more effectively promote competition by exempting cable overbuilders from the DBS-MVPD affiliation restrictions, and abandoning its proposal to impose the Tempo II service and marketing restrictions on DBS operators affiliated with non-DBS MVPDs.

The FCC also should not prohibit exclusive distribution arrangements where multiple DBS operators are competing with one another under uniform rules and with full and fair access to programming. To that end, BellSouth urges the FCC to adopt new program access rules which explicitly prohibit all national satellite programmers (vertically integrated or otherwise) from discriminating in the terms, conditions and prices of programming made available to all MVPDs, including DBS providers. The rules should also state that wholesale DBS service must be made available to all similarly situated MVPDs on non-discriminatory terms and conditions. Finally, to lessen the burden on new entrants into the DBS industry, BellSouth recommends that the FCC impose its proposed Alaska-Hawaii service requirement on new DBS providers only to the extent that such service is both technically feasible and economically reasonable.

#### **B. Buildout, Affiliation and Ownership Restrictions**

In its Notice of Proposed Rule Making (“NPRM”), the FCC proposes to impose specific construction and operational milestones on new DBS permittees. In addition to its existing due diligence rules, the FCC proposes to require each new DBS permittee to complete construction of its first satellite within four years of receiving its authorization, and to complete construction of all satellites in its proposed DBS system within six years of receiving its authorization.<sup>2</sup> BellSouth agrees that these additional requirements will

---

<sup>2</sup> NPRM at para. 27.

minimize the opportunity for DBS permittees to “warehouse” DBS channels in the hope of delaying competitive DBS service to protect their own economic interests.<sup>3</sup>

BellSouth similarly supports the FCC’s proposal to limit any single DBS permittee or licensee to a total of 32 channel assignments at any combination of the four orbital locations capable of full CONUS service.<sup>4</sup> By setting the channel aggregation limit at 32, the FCC will enable DBS providers to offer a competitive mix of services to consumers without risking undue concentration of ownership within the DBS industry.<sup>5</sup> BellSouth requests, however, that the FCC’s rules expressly provide that the channel aggregation limitation apply equally to all DBS providers, irrespective of whether they are affiliated with non-DBS MVPDs. Were the FCC to impose the channel aggregation limitation only on affiliated DBS providers, it would effectively award an unjustified

---

<sup>3</sup> *Id.* (“[The additional requirements] will . . . protect against the possibility that someone might be willing to pay fair market value for DBS resources with no intention of actually using them, for the sole purpose of stymieing full development of the service.”).

<sup>4</sup> *Id.* at para. 42.

<sup>5</sup> BellSouth notes that the FCC appears to contemplate classifying joint marketing agreements as attributable ownership interests for purposes of enforcing the 32-channel limit against providers of DBS service. *NPRM* at para. 48. BellSouth opposes any such proposal. Joint marketing agreements normally do not have any indicia of ownership or control, and thus an entity which merely resells or markets DBS service cannot exercise undue market power within the DBS industry. Further, at least one other Regional Bell Operating Company has already commenced marketing DSS equipment directly to subscribers, who in turn will receive DBS service from DirecTv or USSB. See “Southwestern Bell Will Offer DSS Equipment to San Antonio Customers,” *Satellite News* (November 6, 1995). BellSouth submits that it would be inequitable for the FCC to now establish attribution rules that would inhibit other Regional Bell Operating Companies from marketing DBS service in a similar manner.

advantage to non-affiliated DBS providers and thereby undermine its overriding objective of promoting competition within the DBS industry.

Furthermore, should the FCC adopt its proposed anti-warehousing and channel aggregation rules, BellSouth urges the FCC not to adopt its proposal to prohibit any DBS licensee or operator affiliated with a non-DBS MVPD from controlling or using DBS channel assignments at more than one of the full CONUS orbital locations.<sup>6</sup> BellSouth believes that the anti-warehousing and channel aggregation rules already maximize the potential for near-term competition in the DBS industry, since they would (1) require every new DBS provider to construct its facilities within a reasonable period of time, and (2) limit each new DBS provider to the maximum number of channels necessary for a competitive DBS service. Moreover, it must be remembered that for technical reasons DBS channels at different orbital slots cannot be combined into a single DBS service. Hence, both affiliated and non-affiliated DBS providers already have maximum incentive to accumulate all of their channels at one orbital slot, thus rendering the FCC's proposed orbital slot limitations unnecessary.

The FCC also asks whether its proposed "one orbital slot" restriction on affiliated DBS providers should differentiate between DBS providers affiliated with cable operators and those affiliated with non-cable MVPDs. In addition, the FCC asks whether a more stringent restriction is appropriate for cable operators and other MVPDs, and whether a more stringent limitation should be placed on cable operators seeking to acquire DBS licenses or to operate a DBS service. BellSouth does not believe that cable operators should be subject to greater DBS affiliation limitations than non-cable MVPDs,

---

<sup>6</sup> NPRM at para. 40.

particularly since the FCC's proposed anti-warehousing and channel aggregation rules will effectively prevent cable operators from exercising undue power in the market for DBS services. Should the FCC determine otherwise, however, BellSouth requests that the FCC exempt cable overbuilders from such additional restrictions. Overbuilders compete directly with incumbent cable operators and, due to high investment hurdles and other factors, generally do not enjoy comparable market power. Hence, there is no justification for subjecting overbuilders to the same DBS affiliation restrictions as incumbent cable operators, since they do not pose anywhere near the same threat to competition between the DBS and cable industries.<sup>7</sup>

### **C. Additional Service and Distribution Restrictions are Unwarranted**

BellSouth urges the FCC not to extend the Tempo II service restrictions on DBS operators who are affiliated with non-DBS MVPDs.<sup>8</sup> Specifically, where multiple DBS operators are already competing for subscribers, a DBS operator should not be precluded from (1) using its facilities to offer DBS to subscribers of its affiliated MVPD exclusively or primarily as an ancillary or supplementary service; or (2) offering DBS to customers

---

<sup>7</sup> Prior to the 1992 Cable Act, the FCC's cable-MMDS cross-ownership rule included an "overbuild exception," on the theory that cable-MMDS cross-ownership raises fewer concerns where a second cable operator is already providing competition in the market. In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 6828, 6843 (1993). BellSouth submits that the rationale for the FCC's cable-MMDS "overbuild exception" (which the FCC had to abandon only because Congress did not include it in the statute) applies with equal force in the context of cable-DBS affiliation, and thereby justifies different applications of cable-DBS affiliation restrictions to overbuilders versus incumbents.

<sup>8</sup> NPRM at para. 55.

of its affiliated MVPD on terms and conditions different from those offered to subscribers of non-affiliated MVPDs.

The FCC imposed the Tempo II restrictions specifically on TCI at a time when DBS was still in its infancy and thus was not yet a serious competitive threat to cable. Accordingly, the FCC wanted to ensure that the limited number of DBS channels available were used to provide direct competition to cable systems.<sup>9</sup> Now, however, cable operators face the prospect of significant competition from existing and potential DBS providers,<sup>10</sup> as well as from cable overbuilders and other multichannel services such as wireless cable, video dial-tone, LMDS and SMATV. Since the marketplace conditions that produced the Tempo II restrictions no longer exist, BellSouth submits that it is no longer necessary to impose those restrictions on MVPD-affiliated DBS providers.

For example, assuming maximum concentration of ownership under the FCC's proposed 32-channel aggregation limit, there will be at least four full CONUS DBS providers providing competition to incumbent cable operators in each locality throughout the United States. Even where one of these four full CONUS DBS providers is affiliated with the local cable operator, that operator will still face unaffiliated competition from the three remaining full CONUS DBS providers as well as from the other multichannel competitors cited above. Accordingly, a cable-affiliated DBS provider that offers its DBS service on an ancillary basis and/or on different terms and conditions to subscribers

---

<sup>9</sup> Tempo II, 7 FCC Rcd 2728, 2731 (1992).

<sup>10</sup> See, e.g., "Cable Could Lose 6 Million Subs to DBS Companies," Interactive Video News (October 2, 1995); "DBS Targets Cable Subs," Mediaweek (September 25, 1995) (noting that DirecTV and USSB have already gained access into more than 800,000 homes, and that PRIMESTAR has already signed up 620,000 subscribers).



of non-affiliated MVPDs is unlikely to have any material adverse effect on competition within the DBS industry or within the market for MVPD services generally. Conversely, allowing a cable-affiliated DBS provider maximum flexibility in marketing its DBS service will enable that provider to respond directly and more efficiently to consumer demand, thereby increasing the number and diversity of choices available to existing and potential DBS subscribers.

Furthermore, the FCC proposes to auction available DBS spectrum such that the spectrum is awarded to the entities that value it the most.<sup>11</sup> By requiring prospective DBS providers to pay fair market value for their channels, the FCC has ensured that DBS spectrum will be put to maximum use, since high auction prices will render less than maximum use extremely uneconomical. Indeed, there is little possibility that an entity that has paid potentially hundreds of millions of dollars for DBS spectrum will then simply “warehouse” that spectrum in the name of protecting its other economic interests.

For these very same reasons, BellSouth also opposes any FCC rule which would prohibit a DBS operator from entering into an exclusive retail distribution arrangement with a non-DBS MVPD.<sup>12</sup> In a marketplace that will include multiple DBS providers, exclusive distribution arrangements should have little effect on competition, particularly since DBS providers will not enter into such arrangements if they cannot recoup the extremely high costs of obtaining a DBS license and constructing and operating DBS facilities. In addition, cable overbuilders and non-cable MVPDs may require exclusive DBS distribution arrangements in order to offer a mix of services competitive with that

---

<sup>11</sup> NPRM at paras. 16, 72-106.

<sup>12</sup> NPRM at para. 56.

offered by the incumbent cable operator. Finally, BellSouth submits that as a general matter exclusive contracts in a competitive environment will encourage all MVPDs to compete even more aggressively for subscribers, again facilitating maximization of choice for the consumer.<sup>13</sup>

#### **D. The FCC's Current Program Access Rules are Inadequate**

It is well settled that a DBS provider or other non-cable MVPD cannot compete effectively without fair and non-discriminatory access to the same programming carried by cable television systems. Nonetheless, both the program access provisions of the 1992 Cable Act and the FCC's program access rules by their terms only apply to satellite-delivered cable programming sold by vendors who are vertically integrated with the cable industry. As a result, non-integrated satellite programming vendors may sell their programs on highly preferential terms and conditions to large incumbent cable operators who already enjoy substantial market power.<sup>14</sup> Moreover, the FCC has ruled that even a DBS incumbent may enter into exclusive cable programming contracts with vertically integrated satellite cable programmers.<sup>15</sup>

---

<sup>13</sup> It should be noted that the 1992 Cable Act already permits exclusive distribution contracts between cable operators and vertically-integrated satellite cable programming vendors in served areas, if the FCC finds such contracts to be in the public interest. 47 U.S.C. Section 548(c)(2)(D).

<sup>14</sup> The FCC has since amended its program access rules to allow non-cable MVPDs to file complaints alleging that non-vertically integrated programming vendors have been coerced by cable operators into signing exclusive distribution contracts with cable television systems. Memorandum Opinion & Order at para. 40, FCC 94-203, App. A (MM Docket No. 92-265) (released August 5, 1994)..

<sup>15</sup> Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 3105 (1994) (upholding USSB's exclusive distribution agreements for HBO and Showtime).

BellSouth submits that in view of the enormous financial risk associated with launching and/or marketing a competitive DBS service, the FCC must strengthen its program access rules to ensure that new entrants into the DBS industry have uninhibited access to programming offered by other MVPDs, particularly cable operators. Accordingly, BellSouth requests that the FCC amend its rules to expressly prohibit any satellite cable programming vendor (vertically integrated or otherwise) from discriminating in price, terms and conditions when selling programming to any DBS provider or other non-cable MVPD. Such a rule will not only enable full and fair competition among all MVPDs for programming, but will allow the FCC to avoid the time-consuming and expensive process of regulating non-integrated satellite cable programming vendors on a case-by-case basis.<sup>16</sup>

Finally, BellSouth requests that the FCC amend its program access rules to expressly require wholesale DBS services such as TCI's "Headend in the Sky ("HITS") to be sold to all similarly situated non-cable MVPDs on nondiscriminatory terms and conditions. Simply put, the program access rules should not include any loophole that enables vertically integrated cable operators to avoid selling their programming to non-affiliated MVPDs by packaging that programming for wholesale distribution through their affiliated DBS facilities. In recognition of current marketplace conditions within the DBS industry, the FCC should further clarify that its program access requirements

---

<sup>16</sup> To date the FCC has elected not to amend its program access rules in this manner, instead stating that "[W]here future contracts cause a restriction in the availability of programming to alternative distributors and their subscribers, an aggrieved MVPD could seek redress by filing an "unfair practices" complaint under Section 76.1001 of the FCC's Rules." *Id.* at para. 40.

apply with equal force to wholesale distribution of programming through high-power (e.g., DirecTv, USSB) and medium-power (e.g., PRIMESTAR) DBS facilities.

#### **E. Service to Alaska and Hawaii**

The FCC proposes to require that new DBS permittees provide service to Alaska and Hawaii where such service is technically feasible from the assigned orbital location.<sup>17</sup> While BellSouth supports the FCC's efforts to ensure that viewers in Alaska and Hawaii have access to DBS service, it believes that the FCC should impose an Alaska/Hawaii service requirement only where such service is technically feasible and economically reasonable. Otherwise, the FCC's proposal would require a new DBS permittee who has already paid an enormous sum at auction to provide the service even where it is cost-prohibitive and where another DBS provider at another orbital location is already able to provide the service on a more cost-effective basis. Moreover, given that the FCC anticipates a competitive environment featuring multiple DBS providers, it is extremely unlikely that all or even most DBS providers will forego service to Alaska and Hawaii and thereby lose an opportunity to reach subscribers in those areas.

#### **F. Conclusion**

BellSouth believes that the FCC's Notice of Proposed Rule Making is an important first step towards modifying the agency's rules to ensure prompt, competitive DBS service to the public. Therefore, subject to the exceptions noted above, BellSouth

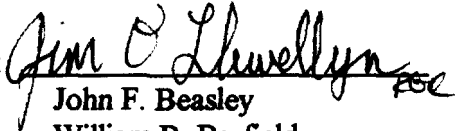
---

<sup>17</sup> NPRM at para. 70.

supports the FCC's proposed rules and requests that the FCC adopt a Report and Order in accordance therewith.

Respectfully submitted,

**BELLSOUTH CORPORATION**

By:  *Jim O. Llewellyn*

John F. Beasley

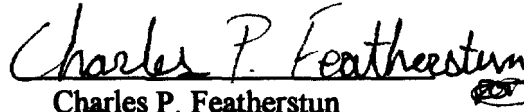
William B. Barfield

Jim O. Llewellyn

1155 Peachtree Street, N.E., Suite 1800

Atlanta, Georgia 30309-2641

(404)249-4445

By:  *Charles P. Featherstun*

Charles P. Featherstun

David G. Richards

1133 21st Street, N.W.

Washington, D.C. 20036

(202) 463-4132

Its Attorneys

November 20, 1995